APPEAL NO. 93071

This appeal arises under the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). On January 5, 1992, a contested case hearing (CCH) was held in (city), Texas, with presiding as hearing officer. The sole issue in dispute at the CCH was "[w]hether claimant was injured in the course and scope of his employment on (date of injury)." The hearing officer determined that respondent, claimant herein, was injured while in the course and scope of his employment on (date of injury). Appellant, employer herein, timely filed an appeal basically challenging the sufficiency of the evidence and requesting we reverse the decision of the hearing officer. Timely responses, as discussed below, were filed.

DECISION

The decision of the hearing officer is affirmed.

Initially we note the employer was a party at the CCH and is the party appealing the CCH decision. On the day of the incident in question, (date of injury), employer's president questioned the circumstances of the incident, as set forth below, and notified the insurance carrier, Service Lloyds Insurance Company, carrier herein. The employer spoke with at least three adjusters and consistently was told that the carrier would contest the claim. The employer followed up changes in adjusters insisting the claim be denied. At the benefit review conference, on February 17, 1992 (almost 13 months after the incident in question) the employer first became aware that the carrier had accepted liability and that the employer, pursuant to Article 8308-5.10, was entitled to receive from the Texas Workers' Compensation (Commission) a description of the services provided and notification of the employer's right to contest the compensability of an injury if the insurance carrier accepts liability. The employer filed on that date, February 17, 1992, an Employer's Contest of Compensability (TWCC-4). The hearing officer determined that the employer exercised reasonable diligence in contesting the compensability of claimant's claim for injury on (date of injury), citing Texas Workers' Compensation Commission Appeal No. 92280, decided August 13, 1992. As this issue is not appealed the hearing officer's determination allowing the employer to contest liability will not be disturbed.

The employer filed a timely appeal, received by the Commission on January 27, 1993. Claimant's attorney filed a timely response, dated February 10, 1993 and received February 15, 1993. Claimant, personally, apart from his attorney filed a "Response to Employer's Notice of Appeal," also timely filed. In that both responses were timely filed we will consider both. However, we notice that claimant's personal response covers issues not the subject of the hearing and contests issues not appealed (such as the determination that employer exercised reasonable diligence in contesting compensability). We have previously held that points of appeal raised in a response will not be considered if that response is not filed within 15 days after the decision of the hearing officer is received, which in this case, it was not. Texas Workers' Compensation Commission Appeal No. 92109, decided May 4, 1992. Therefore so much of claimant's separate personal response as

deals with matters not at issue in this CCH (e.g. aggravation of preexisting conditions) and matters not timely appealed will not be considered.

As to the issue in this case, the evidence as set out by the hearing officer in the discussion of the evidence fairly and accurately summarizes the evidence presented and is adopted for purposes of this decision. As a brief synopsis for purposes of discussion, we note that the claimant testified that he was employed as a new car salesman for employer and that a portion of his job included taking cars out to show customers. Claimant maintains that on (date of injury), a lady customer whose name, address and telephone number he no longer recalls asked him to show her a Ford Festiva, referred to as the car. Claimant states he told his manager he was leaving to show a car, got a slip to get gas and a license plate. Claimant testified he thought he followed the customer's directions, but ended up on the wrong road leading to a dump. Claimant says he turned around to go back to the main road and was on his way back when he lost control of the car and ended up in a ditch. Claimant testified he felt "numb and paralyzed" from the waist down, sustained bruises and contusions, a bloody nose and an abrasion to his left thigh. A passerby called the police, an ambulance and a wrecker. Claimant was taken by ambulance to the hospital where he was kept overnight for observation.

Employer's president, TA testified he became suspicious of how this accident occurred when he saw the car, which had been towed back to the dealership, lacked any damage, and there were inconsistencies in claimant's story. The investigating police officer testified, and there was a corroborating statement from his partner, that the car had not swerved off the road, had not gone through the ditch and clearly had not rolled over. The wrecker operator testified that the car was not disabled, had not gone through the ditch and generally did not need to be towed. Both the police officers and the wrecker operator engaged in sheer speculation as to what might have happened. Both witnesses testified that claimant had a bloody nose, from whatever cause, and that the car's rear view mirror appeared to be cracked or broken.

Areas which were in dispute and about which there were inconsistencies included whether claimant had properly signed out, the name, address, and phone number of the customer claimant said he was going to see, a log book claimant said was in the car, various versions of how the accident occurred as given by the claimant including statements he had made regarding rolling over the car, losing control because a wheel came off, losing control because of ruts in the road, lack of physical evidence of an accident, and generally the lack of any damage or even mud on the car. It was uncontradicted that claimant was taken to the hospital by ambulance, that he sustained a bloody nose and certain abrasions and contusions.

The employer in its appeal cites T.E.I.A. v. Dryden, 612 S.W.2d 223 (Tex. Civ. App.-1980, writ ref'd n.r.e.) and Ledesma v. T.E.I.A., 795 s.w.2d 337 (Tex. App.-Beaumont 1990

[9th Dist] n.w.h.) in support of its position denying an accident or injury occurred in the course and scope of claimant's employment. We note that Dryden, *supra*, stands for the proposition that for a claimant to recover under the Act, he must meet two requirements: first, the injury must have occurred while the claimant was engaged in or about the furtherance of the employer's affairs or business. Second, the claimant must show that the injury was of a kind and character that had to do with or originated in the employer's work, trade, business, or profession. We accept these statements as being correct propositions of law in Texas. Ledesma, *supra*, as it applies to this case, refers us to the standard of review dealing with factual sufficiency points of error as recited in In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Under this standard it is appropriate to set aside the determinations of the hearing officer, as fact finder, in a given case only if ". . . the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust . . . regardless of whether the record contains some 'evidence of probative force' in support of the verdict . . .."

The factual determinations in this case depend largely on the credibility of the witnesses and of the plain and undisputed facts. The hearing officer saw and heard the testimony of the witnesses, including that of the claimant. The hearing officer found, and the testimony supported, that claimant was authorized to drive the car in the execution of his duties and that claimant sustained certain injuries, being a bloody nose and contusions, when claimant lost control of the vehicle, for whatever reason, and drove it off the side of the road on (date of injury). The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). The trier of fact may accept some parts of a witness' testimony and reject other parts. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). And, as the employer pointed out in citing Ledesma, *supra*, in its appeals brief, we will reverse the hearing officer, based on sufficiency of the evidence, only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio, 1983, writ ref'd n.r.e.); In re Kings Estate, *supra*. We will not substitute our judgement for the

hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence. We do not so find.

The decision of the hearing officer is affirmed.

_____

Thomas A. Knapp
Appeals Judge

CONCUR:

_____

Stark O. Sanders, Jr.
Chief Appeals Judge

_____

Susan M. Kelley
Appeals Judge